ROBERT JOHN REEVES

v.

MENTERI SUMBER MANUSIA, MALAYSIA & ANOR

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
ABDUL AZIZ MOHAMAD JCA
RAUS SHARIF JCA
[CIVIL APPEAL NO: W-01-101-1999]
16 MAY 2007

ADMINSTRATIVE LAW: *Remedies - Certiorari and mandamus, application for - Refusal of Minister to refer dismissal of probationer to Industrial Court - Whether issue of alleged unjust dismissal a question of law that must be referred to Industrial Court to be adjudicated upon - Claim of victimization - Whether probationer's representation frivolous or vexatious - Industrial Relations Act 1967, s. 20(3)*

LABOUR LAW: *Industrial Court - Reference by minister - Certiorari and mandamus, application for - Refusal of Minister to refer dismissal of probationer to Industrial Court - Whether issue of alleged unjust dismissal a question of law that must be referred to Industrial Court to be adjudicated upon - Claim of victimization - Whether probationer's representation frivolous or vexatious - Industrial Relations Act 1967, s. 20(3)*

By an appointment letter dated 30 January 1997, the appellant was appointed by the 2nd respondent to the post of Senior Manager, Treasury, International Banking Group of the 2nd respondent. The letter of appointment contained a probation clause of a fixed period. The appellant initially resisted the inclusion of the probationary period but eventually agreed to its inclusion in exchange for a much higher and more generous level of incentive bonus. By a letter dated 2 September 1997, the appellant was informed that, based on the overall assessment of his job performance, he was not confirmed in his appointment. Upon his subsequent termination, he made a representation under s. 20(1) of the Industrial Relations Act 1967 ('Act') to the Ketua Pengarah, Jabatan Perhubungan Perusahaan (Ibu Pejabat) Kuala Lumpur but received the Ketua Pengarah's reply stating that the Minister of Human Resources ('1st respondent') had, in exercising his power under s. 20(3) of the Act, refused to refer the matter

of his termination to the Industrial Court for the following reasons: (i) the appellant had not been confirmed in his post and his services had been terminated at the end of the probation period due to unsatisfactory performance; and (ii) the probation period was a condition in the contract of employment. Being aggrieved, the appellant applied to the High Court for orders of *certiorari* and *mandamus*. The High Court dismissed the application resulting in the present appeal by the appellant.

Held (allowing the appeal)

Per Mokhtar Sidin JCA delivering the judgment of the court:

(1) The right of an employee on probation not to be dismissed without just cause or excuse is settled law. *Khaliah Abbas v. Pesaka Capital Corp Sdn Bhd* (foll). In the present appeal, when the appellant made a representation to the 1st respondent, the appellant claimed that he had been unjustly dismissed merely on the ground that he was on probation and did not fit into the 2nd respondent's organisation. Therefore, the issue before the 1st respondent whether the 2nd respondent as the employer had the right to terminate the services of an employee (the appellant) on probation without just cause was a question of law which must be referred to the Industrial Court to be adjudicated upon. It was clear that, on the facts, the only reason given by the 2nd respondent for the appellant's termination was that the appellant did not fit into the 2nd respondent's organisation. This had to be examined closely *ie*, how and in what manner the appellant did not fit into that organisation, and could only be determined after a full hearing before the Industrial Court. From the affidavits and documents, the appellant contended that he had been dismissed because he had incurred the displeasure of the 2nd respondent's CED in respect of certain transactions. This was a claim of victimization and the whether it was true or not could only be determined after a full hearing. When a claim of victimization is made by an employee, the employer, which in this case was the 2nd respondent, must show that such claim does not exist. *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Anor Appeal* (foll). The appellant submitted that his representation that he had been dismissed without just cause and excuse by the 2nd respondent was neither perverse, frivolous nor vexatious. For that reason alone, the appeal should be allowed. (paras 15, 16, 17, 18 & 19)

Bahasa Malaysia *translation of headnotes*

Melalui surat perlantikan bertarikh 30 Januari 1997, perayu dilantik oleh responden kedua untuk menjawat jawatan Pengurus Kanan Perbendaharaan dalam Kumpulan Bank-Bank Antarabangsanya. Surat perlantikan mengandungi satu fasal mengenai tempoh percubaan untuk satu tempoh tertentu. Perayu mulanya membantah tentang kemasukan fasal berkenaan, tetapi akur apabila diberikan insentif bonus yang lebih tinggi dan bernilai. Melalui surat bertarikh 2 September 1997, perayu diberitahu bahawa, berdasarkan kepada penilaian keseluruhan pencapaian kerjanya, beliau tidak disahkan dalam jawatannya. Berikutnya, ekoran penamatan kerjanya, perayu membuat representasi kepada Ketua Pengarah, Jabatan Perhubungan Perusahaan (Ibu Pejabat) Kuala Lumpur di bawah s. 20(1) Akta Perhubungan Perusahaan 1967 ('Akta'), tetapi menerima jawapan dari Ketua Pengarah bahawa Menteri Sumber Manusia ('responden pertama'), dalam melaksanakan kuasanya di bawah s. 20(3) Akta, enggan merujuk halperkara penamatan kerjanya ke Mahkamah Perusahaan atas sebab-sebab bahawa: (i) perayu belum disahkan dalam jawatan dan perkhidmatannya telah ditamatkan di akhir tempoh percubaan disebabkan prestasi kerja yang tidak memuaskan; dan (ii) tempoh percubaan merupakan satu syarat dalam kontrak pekerjaan. Terkilan, perayu memohon ke Mahkamah Tinggi untuk perintah-perintah *certiorari* dan *mandamus*. Mahkamah Tinggi menolak permohonan dan perayu memfail rayuan semasa.

Diputuskan (membenarkan rayuan)
Oleh Mokhtar Sidin HMR menyampaikan penghakiman mahkamah:

(1) Hak seorang pekerja yang masih dalam percubaan untuk tidak dibuang kerja tanpa alasan yang adil dan munasabah sudah menjadi undang-undang mantap. *Khaliah Abbas v. Pesaka Capital Corp Sdn Bhd* (diikuti). Dalam rayuan semasa, apabila perayu membuat representasi kepada responden pertama, perayu mendakwa bahawa beliau telah dibuang kerja secara yang tidak adil dan semata-mata atas alasan bahawa beliau masih dalam tempoh percubaan dan kerana itu tidak sesuai dengan organisasi responden kedua. Dengan hal yang demikian, isunya adalah sama ada isu yang dihadapi responden pertama, iaitu sama ada responden kedua sebagai majikan berhak untuk menamatkan perkhidmatan seorang pekerjanya (perayu) yang masih berada dalam tempoh percubaan tanpa

sebab dan alasan yang adil, mesti harus dirujuk ke Mahkamah Perusahaan untuk diadili. Adalah jelas bahawa, di atas fakta, satu-satunya alasan yang diberikan oleh responden kedua atas penamatan kerja perayu adalah bahawa perayu tidak dapat disesuaikan dengan organisasi responden kedua. Perkara ini perlu diteliti dengan lebih halus, iaitu kenapa dan bagaimana perayu dikatakan tidak sesuai dengan organisasi tersebut, dan ini hanya dapat diputuskan selepas satu pendengaran penuh oleh Mahkamah Perusahaan. Dari afidavit-afidavit dan dokumen-dokumennya, perayu berhujah bahawa beliau dibuang kerja kerana telah membangkitkan kemarahan CED responden kedua berkaitan suatu transaksi tertentu. Ini adalah dakwaan penganiayaan dan sama ada ianya benar atau tidak hanya dapat ditentukan dalam satu perbicaraan penuh. Bilamana dakwaan penganiayaan dibuat oleh seorang pekerja, majikan, yakni responden kedua di sini, hendaklah membuktikan bahawa dakwaan tersebut tidak wujud. *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Anor Appeal* (diikuti). Seperti yang ditegaskan perayu, representasi bahawa beliau telah dibuang kerja tanpa alasan yang adil dan munasabah oleh responden kedua bukanlah sesuatu yang menyalahi kesusilaan, remeh ataupun menyusahkan. Atas alasan ini sahaja, rayuan harus dibenarkan.

Case(s) referred to:

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal [1997] 1 CLJ 665 CA ***(foll)***

Khaliah Abbas v. Pesaka Capital Corp Sdn Bhd [1997] 3 CLJ 827 CA ***(foll)***

Legislation referred to:

Industrial Relations Act 1967, ss. 20(1), (2), (3), 54(2)

For the appellant - P Kuppusamy; M/s P Kuppusamy & Co

For the 1st respondent - Suzana Atan SFC (Nor Mastura Ayob SFC with her); AG's Chambers

For the 2nd respondent - Steven Thiru (Shamsul Bahrin Manaf with him); M/s Shook Lin & Bok

[Appeal from High Court, Kuala Lumpur; Originating Motions No: R3-25-99-1998]

Reported by Suresh Nathan

JUDGMENT

[1] We have allowed this appeal earlier and now we give our reasons for doing so.

[2] The appellant applied to the High Court at Kuala Lumpur for an order of *certiorari* and an order of Mandamus of the decision of the Honourable Minister of Human Resources (the 1st respondent) made on 30 July 1998 pursuant to s. 20(3) of the Industrial Relations Act 1967 ("the Act"). The application was dismissed.

[3] The facts leading to this appeal:

[4] By an appointment letter dated 30 January 1997, the appellant was appointed by the 2nd respondent to the post of Senior Manager, Treasury, International Banking Group of the 2nd respondent. The letter of appointment contained a probation clause of a fixed period. Initially the appellant resisted the inclusion of the probationary period. Eventually he agreed to the inclusion of this clause in exchange for a much higher and generous level of incentive bonus. By a letter dated 2 September 1997, the appellant was informed that, based on the overall assessment of the appellant's job performance, the appellant was not confirmed in his appointment. The appellant's appointment was terminated on 3 September 1997. By a letter dated 19 September 1997, the appellant made a representation under s. 20(1) of the Act to the Ketua Pengarah, Jabatan Perhubungan Perusahaan (Ibu Pejabat) Kuala Lumpur. The appellant received the reply from the Ketua Pengarah dated 5 August 1998 that the Minister of Human Resources ("the Minister") had, in exercising his power under s. 20(3) of the Act, refused to refer the matter of the appellant's termination to the Industrial Court. A copy of the Minister's decision which was dated 30 July 1998 was enclosed in that letter. The appellant then made the present application to the High Court.

[5] In his affidavit in support of the application, the appellant deposed that in refusing to refer his termination to the Industrial Court, the Minister had acted arbitrarily and/or in excess of jurisdiction and/or misdirected himself in law and/or failed to take into account or gave undue weight to irrelevant facts and/or reached a conclusion which no other person or tribunal could

have plausibly come to. The appellant further averred that the 1st respondent had acted arbitrarily and/or in excess of jurisdiction in that he had:

(i) concluded that the appellant's performance was unsatisfactory without any rational or probative basis in the light of the matters deposed to in his affidavit;

(ii) passed a judgement on the appellant's performance in the absence of any performance appraisal or documents or evidence establishing that the appellant's performance was poor;

(iii) taken over the total function of the Industrial Court, which was set up by law to determine the disputed facts in cases like the appellant, and in effect upheld the appellant's dismissal as with just cause and excuse, thus defeating the policy and object of the Industrial Relations Act, 1967;

(iv) concluded in effect that the appellant's contention of being unfairly dismissed is frivolous and vexatious in spite of there being no admission on the appellant's part as to anything adverse about his performance and that the material facts of his case can only be determined through a hearing at the Industrial Court and not through the process of conciliation by the Department of Industrial Relations thus denying to the appellant the rights of Natural Justice.

The appellant also averred that the 1st respondent has misdirected himself in law in that he had:

(i) confined himself strictly to the contractual provision of a six (6) months probation period as giving the right to the 2nd respondent to terminate the contract at the end of the probation period;

(ii) consequently failed to appreciate the established law that a workman, whether on probation or confirmed in his appointment, has the same rights to security of tenure in his job and that this proprietary right in the job cannot be taken away without due cause;

(iii) failed to take into account the fact that the appellant had a contract of employment for three years.

The affidavit also stated the 1st respondent failed to take into account and/or give due weight to relevant facts in determining the tenure of the appellant's employment as having been terminated at the end of the contractual probation period and thereby committed errors of law in that:

(i) the appellant had prior to his appointment, supplied full information to the 2nd respondent on his antecedent experience and knowledge in the area of his appointment;

(ii) he had been given oral and/or written assurance that his employment was to be for a long term period and that the probation period was a mere formality, hence inducing the appellant to withdraw his objection to a probation period;

(iii) the appellant had uprooted his family from Australia to Malaysia, with consequent sacrifice of his wife's business activities in Australia on the agreement for a long term contract.

The appellant also averred that the 1st respondent, in concluding that the appellant's performance was unsatisfactory committed errors of law in that the 1st respondent failed to take into account and/or give due weight to the following material facts:

(i) that there was no written or other evidence of complaints about the appellant's performance;

(ii) that the appellant had been victimized due to the events stated especially in respect of KLIBOR futures transaction;

(iii) that the truth of the appellant's allegation of being victimized can only be determined by a proper inquiry before the Industrial Court.

Lastly, the appellant averred that the 1st respondent committed errors of law in that he took into account and/or gave undue weight to irrelevant facts:

(i) that the appellant was on probation and that the 2nd respondent had stated that the appellant's performance was poor during the probation period without requiring the 2nd respondent to discharge the burden on it to establish poor performance;

(ii) that the appellant had been terminated at the end of his probation period according to a contractual provision without examining the validity of the reasons for such termination.

The 1st respondent in his affidavit in reply stated as follows:

(i) On 3 July 1998 he was informed by the Ketua Pengarah Perhubungan Perusahaan Malaysia, under s. 20(2) of the Act that steps had been taken by the latter to conciliate but the conciliation failed.

(ii) The said Ketua Pengarah informed the 1st respondent of the information received by the Ketua Pengarah during the conciliatory meeting and handed over to the 1st respondent the documents that related to the appellant's representation.

(iii) After perusing those documents and the information, the 1st respondent was of the view and satisfied that there was no necessity to refer the representation to the Industrial Court.

(iv) The 1st respondent's decision not to forward the representation to the Industrial Court was conveyed through the letter dated 5 August 1998.

(v) In exercising his discretion under s. 20(3) of the Act, he had acted in accordance with the Act and the spirit of the Act to make a just, equitable and bona fide decision.

The 1st respondent also stated in his affidavit that he had not misinterpreted the Act and believed that his decision was *intra vires* of the Act. Further, he had considered all the relevant facts presented to him for his consideration and was satisfied that it was not necessary to refer the appellant's representation to the Industrial Court.

[7] The 2nd respondent's affidavit in reply was dated 13 April 1999 and affirmed by Tan Ghee Kay, the Company Secretary of the 2nd respondent. In that affidavit the 2nd respondent averred that the appellant was not "employed" by the 2nd respondent because the appellant was on probation at all material times. The affidavit further stated that the 2nd respondent had informed the Conciliation Officer the reason for the termination was the unsatisfactory performance by the appellant during his probationary period. The affidavit also stated that the proceedings before the Conciliation Officer cannot be referred to in the Industrial Court by virtue of s. 54(2) of the Act. The affidavit went on to state that there was no basis for the appellant to contend that his appointment was not conditional upon the initial probationary period of six months. The 2nd respondent contended

that there was sufficient material before the 1st respondent to come to the decision that he had made and for that reason the 1st respondent had not acted arbitrarily and/or in excess of jurisdiction and/or misdirected himself in law and/or failed to take into account or given undue weight to irrelevant facts and/or reached a conclusion completely devoid of any merit.

[8] Before us, the learned counsel for the appellant submitted that the appellant was appointed by the 2nd respondent to the post of Senior Manager, Treasury, International Banking Group effective 3 March 1997. (The letter of appointment is at pp. 284-289 of the appeal record). Clause 5 of the appointment letter stated that there would be a probation period of six (6) months from the date of appointment. The appellant had requested that the probation clause be deleted on the ground that he had a wife and two small children. The wife who ran her own consultancy practice in Melbourne had to give up the practice (pp. 303-308 of the appeal record). The reply to the request by the appellant in respect of the probation was a letter dated 25 November 1996 from the Company Secretary (Mr. Tan Ghee Kay), the contents of which read:

> **Re: Appointment**
>
> We refer to your letter of 19 November 1996 directed to the attention of Dato CED.
>
> Whilst the points raised will be considered by our Dato CED (who will revert to you later as he is away presently), it may be pertinent for us at our end to share with you one or two related matters.
>
> The Bank's culture is very much grounded on Asian values where handshakes are still the norm in sealing deals. An indication, especially from the top most authority, that a thing would be done can be and should be taken as done (of course in due time). Reducing it to hardcopy with a myriad of legal jargon is not often practised and will not mean that the commitment given to it will be thereby enhanced.
>
> The Bank believes in the principle of mutual trust and the maintenance of goodwill on both sides; especially, where it concerns on employment of opportunities and prospects. A lot of it could be give and take, nurtured in most cases by tonnes of patience thrown in.
>
> We trust that by bringing out the above, they may help you to size up what our Bank is and what it stands for.

The appellant's response to this was the facsimile dated 26.11.1996:

> Thank you for your facsimile outlining a number of matters and particularly the information regarding the Bank's culture and principles. Let me assure you that the values you expressed are very dear to me, particularly the intention to have a strong relationship through mutual trust and the maintenance of goodwill.
>
> Your suggested approach of not being too legalistic is most welcomed and you will understand I need to take care with the overall arrangements as any decisions made will naturally impact my wife and two young boys [3 and 1 years old]. Jennifer and I will be in Kuala Lumpur between 9 and 13 December and would be pleased if we had the opportunity to meet.
>
> I look forward to discussing the details of the arrangements with Dato' Tan on his return to office. Thank you once again for your valuable advice and assistance.

[9] The appellant submitted that his functions as the Senior Manager, Treasury, were spelt out in the Statement of Duties issued by the 2nd respondent in March 1997. However, the CED had, in his letter dated 13 November 1996, stated that the appellant's responsibility for overall treasury functions would include macro level elements.

[10] In respect of the events leading to his dismissal, the appellant contended that on 23 July 1997, he received a memo from Mr. Philip Low, Manager Treasury, International Banking Group, stating that the CED had instructed Mr. Philip Low at a meeting held on 22 July 1997, to undertake certain KLIBOR futures transactions. In the same memo, Mr. Philip Low had expressed his reservations in respect of the CED's instructions in view of Bank Negara Malaysia (BNM) guidelines. Under the said guidelines, the 2nd respondent were to have a committee to oversee and approve derivative activities within the guidelines set by the Board, with an independent compliance unit to monitor such activities. When the CED's instructions were given, various measures aimed at compliance with the said BNM guidelines had been introduced, the 2nd respondent was not in a position to undertake the KLIBOR transactions, since BNM guidelines had not been complied with fully. According to the appellant, if the 2nd respondent participated in the said KLIBOR transactions at that time, the 2nd respondent would be in breach of the BNM

guidelines and thus exposed to the risk of being given a demerit. The appellant then decided to approach the CED of the 2nd respondent to apprise him of the actual situation and to defer the participation until the 2nd respondent was able to comply with the BNM guidelines. On 24 July 1997, the appellant met the CED of the 2nd respondent and advised the latter accordingly. The CED agreed that the necessary requirements for compliance with the guidelines should be met. The CED also consented to the appellant involving other managers in the task. The appellant and Mr. Philip Low proceeded to organize a meeting of the senior managers, which Mr. G.K. Tan chaired. On 30 July 1997, the appellant met the CED in the presence of Mr. Philip Low, Ms. B.H. Teh and Mr. G. K. Tan where the CED was informed that the senior managers had a meeting on 29 July 1997 to commence establishing the management infrastructure under the guidelines. The CED was also informed that no KLIBOR transactions had taken place and that the senior managers were uncomfortable about moving quickly until they had a fuller understanding of the derivatives trading in general. The CED then threatened the appellant and Mr. Philip Low that if they did not undertake the KLIBOR transactions as previously directed by him, he would get rid of them and get other people to do the transactions. On 1 August 1997, the appellant was summoned to see the CED who inquired from the appellant why he had called an Asset and Liability Committee meeting in his absence and without his agreement. The CED then went on to question whether the appellant fitted in and whether he could work according to Southern Bank Rules. The CED also asked the appellant whether the appellant should leave. The appellant informed the CED that the meeting was not an Asset and Liability Committee meeting and that he was moving as quickly as possible to get into place the infrastructure requirements to participate in the KLIBOR transactions. On 4 August 1997, the appellant sent a memo to Mr. G.K. Tan regarding compliance with BNM guidelines and also the CED's threat to dismiss the appellant. The appellant also requested Mr. G.K. Tan to clarify the misunderstanding in respect of the meeting that took place on 29 August 1997. On 7 August 1997, the appellant met the CED in the latter's office where the CED indicated that the appellant did not fit in with the 2nd respondent and that the appellant should change his approach. The appellant then compiled a strategy paper entitled "Contribution Framework" and sent it under cover of a memorandum dated 12 August 1997 to the CED. There was no

response to this memo. On 2 September 1997, the appellant received a letter from the 2nd respondent informing him that his services with the 2nd respondent had been terminated.

[11] On 19 September 1997, the appellant lodged a complaint with the Director General of Industrial Relations under s. 20 of the Act. On receiving the complaint the Director General proceeded to conduct a conciliatory meeting between the parties. The parties could not come to an amicable settlement and as a result the matter was reported to the 1st respondent. Based on the materials made available to him by the Director General, the 1st respondent decided not to refer the appellant's representation to the Industrial Court. In short, the reasons given by the 1st respondent in refusing to refer the matter to the Industrial Court were:

(i) the appellant had not been confirmed in his post and his services had been terminated at the end of the probation period due to unsatisfactory performance; and

(ii) that the probation period of six months is a condition in the contract of employment.

Being aggrieved by the decision of the 1st respondent, the appellant applied to the High Court for orders of *certiorari* and *mandamus*. The High Court dismissed the application. Hence the present appeal.

[12] Before us, the learned counsel for the appellant submitted that the learned judge was in error in dismissing the appellant's application. He also said that it is settled law that in considering a representation made under s. 20(1) of the Act and in exercising the discretionary power vested in him under s. 20(3) of the Act, the 1st respondent has to ask himself the following questions:

(a) whether the way in which he proposes to exercise his discretion will have the effect of settling the particular dispute; and

(b) whether objectively speaking, the representation made under s. 20(1) of the Act is frivolous or vexatious.

He cited *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal* [1997] 1 CLJ 665 in support of this proposition. The appellant further submitted that in exercising his discretion the 1st respondent ignored the materials that were before him. In

refusing the prayers prayed for by the appellant the learned judge did not carry out "a meticulous examination of the facts and materials that were made available". The evidence made available in the affidavits and the various documents shows that the appellant wrote a lengthy letter on 22 September 1997 to the 2nd respondent in which he had set out in detail the events leading to his dismissal. *Inter alia*, the said letter stated:

(i) that on 23.7.1997, in the presence of Mr. G.K.Tan, the Company Secretary and Ms. Teh Beng Hooi, the Manager of Special Projects, the CED had verbally instructed the Manager Treasury, International Banking Group, Mr. Phillip Low (who reported to the appellant) to undertake certain KLIBOR futures transactions;

(ii) that the 2nd respondent would be in violation of Bank Negara Malaysia Guidelines if it was to undertake the transactions as the 2nd respondent had been excluded from undertaking such transactions because of its inability at that time to comply with the Guidelines;

(iii) that on 24.7.1997, the appellant had drawn to the attention of the CED his concerns about undertaking the transactions without first meeting the requirements set out in the Guidelines;

(iv) that the BNM Guidelines did not permit the Chief Executive Officer to be directly involved in the trading of derivatives or to consciously influence the 2nd respondent to assume an exposure in a particular trading position and that the CED's directive to Philip Low, on the face of it, breached the restriction;

(v) that on 30.7.1997, the CED had threatened to get rid of both the appellant and Philip Low if they did not carry out his instructions to undertake the KLIBOR transactions;

(vi) that on 1.8.1997, the CED had indicated to the appellant that he should go as he was not "fitting in" and working to "Southern Bank rules";

(vii) that on 6.8.1997 at a meeting at which the appellant was not present, the CED had instructed one Eddie Koo, the Chief Executive Officer of Southern Finance Company Berhad, to undertake the KLIBOR transactions;

(viii) that on 7.8.1997, the CED had indicated to the appellant that he still did not fit in; and

(ix) that as at 7.8.1997, neither the CED nor anybody else had provided him with any written information on his performance.

[13] There was no response from the 2nd respondent in particular the CED of the 2nd respondent as to the above allegations. It was contended by the appellant that the 1st respondent in coming to his decision, had completely ignored and/or refused to take into account all the material facts placed by the appellant. The learned counsel for the appellant raised the issue of how the 1st respondent could arrive at the conclusion that the 2nd respondent was justified in terminating the services of the appellant on the ground of poor performance in the absence of evidence to substantiate the allegation.

[14] In the affidavit in reply, the 2nd respondent did not respond to the allegations by the appellant. The letter of termination by the 2nd respondent simply stated that the appellant did not fit into the 2nd respondent's organisation but there was no elaboration of how and in what manner the appellant did not fit into the 2nd respondent's organisation. No other reasons were given for the termination. It is obvious to us that just because the appellant was on probation the 2nd respondent thought could be dismissed at will without giving any reason or ground for the termination. Apparently, the 1st respondent took the same view when he refused to refer the appellant's termination to the Industrial Court. This can be seen from the decision of the Minister dated 30 July 1998 which reads:

Akta Perhubungan Perusahaan 1967 (AKTA 177)

Keputusan Menteri Di Bawah Subseksyen 20(3)

BAHAWASANYA setelah menerima pemberitahuan Ketua Pengarah Perhubungan Perusahaan Malaysia mengenai representasi daripada

Encik Robert John Reeves, 19, Jalan Taman U-Thant, Ampang 55000 Kuala Lumpur mengenai pembuangan kerjanya oleh Southern Bank Berhad, 20th.Floor, Wisma Genting, 28, Jalan Sultan Ismail, P.O. Box 12281, 50772 Kuala Lumpur pada 3.9.1997 dan setelah meneliti keterangan daripada laporan usaha-usaha rundingan damai, saya berpendapat adalah tidak wajar bagi rayuan mengenai pembuangan kerja beliau dirujuk ke Mahkamah Perusahaan atas alasan-alasan seperti berikut:

i) perayu telah tidak disahkan dalam jawatannya dan ditamatkan perkhidmannya pada akhir tempoh percubaan kerana prestasi kerja yang tidak memuaskan;.

ii) tempoh percubaan 6 bulan merupakan salah satu syarat dalam perlantikan perayu oleh pihak majikan.

Bertarikh 30 haribulan Julai, 1998.

t.t.
(Dato' Lim Ah Lek, SIMP, DSAP, SMT, JP)
Menteri Sumber Manusia
Malaysia.

In that letter, the 1st respondent stated that after perusing the evidence in the concialitory meetings the 1st respondent was of the opinion that the termination of the appellant was not appropriate to be referred to the Industrial Court on the grounds:

(i) the appellant was not confirmed in his post and he was dismissed at the end of his probation period because his work was unsatisfactory; and

(ii) the probation period of six months was one of the terms and conditions of the appellant's appointment.

No other reasons were given. There was nothing in that letter and in the affidavit as to what was the nature of the unsatisfactory work other than the 2nd respondent's contention that the appellant did not fit into the 2nd respondent's organisation.

[15] The right of an employee on probation not to be dismissed without just cause or excuse is settled law. This has been decided in the case of *Khaliah bte Abbas v. Pesaka Capital Corp Sdn Bhd* [1997] 3 CLJ 827. In that case the appellant joined the services of the respondent in May 1991 as an administrative assistant and was placed on three months' probation. At the end of her probationary period, she was dismissed on the ground that she had 'not met the standard requirements for confirmation'. She contended that she was unfairly dismissed and her representation was referred to the Industrial Court under s. 20(3) of the Act. The Industrial Court concluded that her dismissal was without just cause or excuse and awarded her compensation of nine months arrears of salary. In the High Court, the respondent contended that the appellant, being a probationer, was not a workman within the meaning of s. 20(1) of the Act and, therefore, the Industrial

Court had no threshold jurisdiction to entertain her representation. The High Court allowed the application for *certiorari* and quashed the award of the Industrial Court. The appellant appealed. In allowing the appeal, Shaik Daud JCA, delivering the judgment of the Court of Appeal said at p. 831:

> It is our view that an employee on probation enjoys the same rights as a permanent or confirmed employee and his or her services cannot be terminated without just cause or excuse. The requirement of *bona fides* is essential in the dismissal of an employee on probation, but if the dismissal or termination is found to be a colourable exercise of the the power to dismiss or is a result of discrimination or unfair labour practice, the Industrial Court has the jurisdiction to interfere and to set aside such dismissal. In the present case, we find that the Industrial Court made a finding of fact that the dismissal of the appellant was without just cause or excuse.

[16] In the present appeal, when the appellant made a representation to the 1st respondent, the appellant claimed that he had been unjustly dismissed merely on the ground that he was on probation and did not fit into the 2nd respondent's organisation. Therefore, the issue before the 1st respondent whether the 2nd respondent as employer had the right to terminate the services of an employee (the appellant) on probation without just cause was a question of law which must be referred to the Industrial Court to be adjudicated upon. In this appeal, it is clear to me that the only reason given by the 2nd respondent was that the appellant did not fit into the 2nd respondent's organisation. This has to be examined closely, how and in what manner the appellant did not fit into that organisation. This could only be determined after a full hearing before the Industrial Court.

[17] In this appeal, from the affidavits and the documents before us, the appellant contended that he had been dismissed because he had incurred the displeasure of the 2nd respondent's CED in respect of the KLIBOR transactions. He had advised the CED not to participate in the KLIBOR until the BNM's guidelines had been complied with whereby he and Philip Low were threatened with termination. This is a claim of victimization. Whether it is true or not could only be determined after a full hearing.

[18] When a claim of victimization is made by an employee, the employer which in this case is the 2nd respondent must show that such claim did not exist. In this respect, I would like to refer to

what Siti Norma Yaakob JCA (as she then was) said in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan and Another Appeal* [1997] 1 CLJ 665 at p. 755:

> The allegation of victimization is a very serious charge not to be taken lightly or brushed aside as being trivial, and it warrants the Industrial Court to inquire whether such a charge can be made out or not. This is more so in this case, as Mr. Roger Tan did not file any affidavit to rebut the allegation except for a general denial by one Mr. Lim How Soon, a director of the first appellant, which is hearsay evidence and not convincing enough.
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> It is also not correct to maintain that the second appellant could not have been made aware of the defence of victimization, as there is evidence that the respondent had attached a statement to his letter of appeal to reinstate dated 19 June 1990 addressed to one Mr. A Murugavell, the officer in the industrial relations office, who was conducting the conciliatory meetings between the respondent and the first appellant. In his statement, the respondent sets out his career history in Hong Leong Group and this included his allegation of victimization at the hands of Mr Roger Tan. This letter and statement must form part and parcel of the materials that were forwarded by the Director General to the second appellant and the latter cannot now be heard to say that he was not made aware of the respondent's defence of victimization.

In the same case, Gopal Sri Ram JCA at pp. 743-745 has the following to say about 'victimization':

> Second, the material that was examined by the learned judge was the very same as that before the Minister. This comes across from the affidavit of the Minister and from the relevant documents themselves. The allegation of victimization made by the respondent against Roger Tan and contained in his letter of 19 June 1990 was before the Minister, as were the notes of the domestic inquiry. Accordingly, the criticism that the learned judge decided the case upon material not made available to the Minister is entirely without foundation.
>
> …
>
> In the circumstances, I am of the view that the concession made by learned senior federal counsel during her argument that the Minister was under a duty in this case to consider whether the terms of employment actually applied to the respondent represents the true legal position;

(3) The respondent repeatedly denied, during the domestic inquiry, any misconduct on his part. The denial, to borrow the language of Jemuri Serjan SCJ in the National Union of Journalists' case, 'takes a centre stage' in the determination of his guilt or innocence upon the charges brought against him. It is certainly a question that requires to be adjudicated upon.

(4) The allegation of victimization made by the respondent is certainly one that merits further investigation when viewed against the background of the whole case as outlined with great care by the learned judge. It may be true or false depending upon the facts as revealed in the course of the proceedings before the Industrial Court. But it must be gone into.

Those, then, are some of the serious questions that have arisen in this case. Applying the Hashim Yeop's test, it is plain to see that the representations made by the respondent are neither perverse, frivolous nor vexatious. To say, as the appellant had said, that the material before the Minister did not disclose any serious questions is to mimic Nelson at Trafalgar and turn a blind eye to the obvious.

Of the complaint of victimization, it has been submitted by the appellant and the Minister that this was never raised during the domestic inquiry but only much later. That submission goes to the weight of the allegation, which, with respect, is not a matter for the Minister to decide. What weight ought to be assigned to the complaint is for the Industrial Court to determine.

Those familiar with the law and practice in the field of industrial relations will be aware of cases which demonstrate the reluctance of a workman to raise before a domestic inquiry, an allegation of victimization against one who is seised of managerial power. His immediate concern is to hold on to the job he has. It is, therefore, not unusual to find a singular lack of motivation on his part to make what the management may perceive to be inflammatory statements against a person in authority. One may therefore appreciate such reticence brought about by a desire not to place his sole source of income in jeopardy.

In the proceedings in the court below, the respondent repeated the allegation of victimization on oath. There was no affidavit in response from Roger Tan denying this serious allegation. Neither did the appellant put in evidence to explain why this could not be done. It was not a matter that could be brushed aside as being improbable or obviously incredible. The judge was therefore quite

right in taking this allegation of victimization into account when arriving at his decision. Indeed, I would go so far as to say that it would have been quite wrong for him to have ignored it.

[19] The appellant submitted that the appellant's representation that he had been dismissed without just cause and excuse by the 2nd respondent was neither perverse, frivolous nor vexatious. For that reason alone the appeal should be allowed.

[20] For the reasons we have stated above, we allowed the appeal by the appellant with costs here and below. The appellant was entitled to an order of *certiorari* to quash the decision of the 1st respondent made on 30 July 1998 and an order of mandamus directed to the 1st respondent requiring him to refer the matter of the appellant's dismissal to the Industrial Court. The deposit was ordered to be refunded to the appellant.

[21] My learned brothers, Abdul Aziz Mohamad, JCA and Raus Sharif, J had seen the judgment in the draft and agreed to it.